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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, etc., et al.,
Petitioners,

v.

ANNA BARRERA, etc., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PARENTS RIGHTS, INC., AND THE LUTHERAN CHURCH—MISSOURI SYNOD, AMICI CURIAE

INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent statutory provisions, the provisions of the United States Constitution involved, and the opinions of the courts below are set out in the briefs filed by the petitioners and the respondents. The amici curiae accept them for purposes of this brief. Both parties have consented to the filing of this brief by the amici curiae.

THE INTERESTS OF THE AMICI CURIAE

Parents Rights, Inc. is a not-for-profit organization whose purpose is to promote through the legislative and judicial processes programs which extend a fair share of public educational benefits to those parents who choose to educate their children in non-public schools. The legislation challenged in this suit by petitioners is of the type sponsored by this amicus.

The Lutheran Church—Missouri Synod is a worldwide organization of congregations consisting in membership of nearly 3 million people. Many of these congregations support and operate approximately 1,300 elementary and secondary schools within the United States. All of these schools are nonprofit, tax exempt, and adhere to the Civil Rights Act. One-third of the nearly 165,000 pupils enrolled are children of parents who are not members of the congregations which operate these schools; 10% of the enrollment constitutes children from minority groups. The Lutheran Church—Missouri Synod believes that parents are responsible for the education of their children, and that, together with the Church, they can provide a quality program of Christian education for the children of parents who desire an educational alternative that provides for spiritual and moral development. The Church is very concerned that the rights of the children who attend these schools are in no way curtailed through court action that would declare them ineligible for federal aid to education.

SUMMARY OF ARGUMENT

Denial of educational benefits to those who choose religiously-oriented schools constitutes an unlawful condition upon their First Amendment rights, and violates the principle of neutrality toward religion by influencing that choice. The Supreme Court has heretofore not taken into consideration these

claims, and instead has only concerned itself with possible Establishment Clause violations, some of which are not even worthy of consideration, and all of which are answerable. If the guarantee of religious liberty embodied by the Free Exercise Clause of the First Amendment is to continue to have meaning, then the Court must reverse its recent decisions and adopt an equitable policy in regard to religiously-oriented schools.

PRELIMINARY STATEMENT

Petitioners argue in their brief (p. 26) that this case is indistinguishable from **Lemon v. Kurtzman** and **Earley v. Di Censo**, 403 U.S. 602 (1971) in that the type of aid involved here differs only technically from that which was held violative of the Establishment Clause in **Lemon-Di Censo**. Petitioners also cite the recent decisions in **Levitt v. Committee for Public Education and Religious Liberty**, 93 S. Ct. 2814 (1973), **Committee for Public Education and Religious Liberty v. Nyquist**, 93 S. Ct. 2955 (1973), and **Sloan v. Lemon**, 93 S. Ct. 2982 (1973). The Title I program is an auxiliary rather than fundamental aid program, and as such could be found permissible as were textbooks in **Board of Education v. Allen**, 392 U.S. 236 (1968). The purpose of this brief, however, is not to distinguish the aforementioned cases, but rather to challenge the validity of the basic principles on which they rest.

It is submitted that the principles of **Lemon-Di Censo, Levitt, Nyquist** and **Sloan** comprise a gloss on the First Amendment, the effect of which is to nullify the Free Exercise Clause, or at least to render it subservient to the Establishment Clause in those areas in which the two Clauses conflict. While there has been frequent mention of the "complexity" of the aid to non-public school question, the majority opinions in these cases are more indicative of predispositions than of thoughtful analysis. In contrast, the dissenting opinions in **Levitt, Nyquist** and **Sloan**

take cognizance of the basic inequity inherent in the denial of public educational benefits to taxpayers who choose to educate their children in non-public schools, a choice guaranteed them by **Pierce v. Society of Sisters,** 268 U.S. 510 (1925). More important than the specific issue of the validity of the Title I program is the formulation of a policy by this Court which takes into account certain essential First Amendment rights of non-public school parents and children. Therefore the following discussion will treat this broader question rather than the particular merits of the instant case.

ARGUMENT

I. The Denial of Public Educational Benefits to Those Who Choose Religiously-Oriented Schools Constitutes an Unlawful Condition Upon the Exercise of Their First Amendment Rights.

Pierce v. Society of Sisters established the prime right of parents to educate their children as they see fit. When parents and their children choose religiously-oriented education their action is afforded the additional protection of the Free Exercise Clause. In practice, however, this right is not absolute. Those who choose non-public schools are denied a share of public educational benefits; they are also denied any relief from the tax burden imposed on them to support the public schools. The denial of public benefits for exercising First Amendment rights indirectly infringes upon those rights. In **Speiser v. Randall**, 357 U.S. 513 (1958), the Court, in striking down a California statute which denied a veteran tax exemption to persons who refused to subscribe to a loyalty oath, said:

> "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in this argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech." At p. 518.

In **Sherbert v. Verner**, 374 U.S. 398 (1963), a landmark religious liberty case, the Court held that the government not only may not refuse a benefit for exercising one's rights, but that it must also make exception for those people who, due to their beliefs, are unable to avail themselves of a benefit.

In **Sherbert**, a member of the Seventh-Day Adventist Church in South Carolina was discharged by her employer because she

would not work on Saturday, the Sabbath Day of her faith. She filed for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. The State Employment Security Commission denied her the benefits because she had failed to accept "suitable work when offered," an eligibility requirement of the Act. The Commission's ruling was upheld by the South Carolina Court.

Upon appeal to the Supreme Court, the decision was overruled. The reversal was based on this reasoning by the Court:

> "We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For 'if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' **Braunfeld v. Brown,** 366 U.S. 599 at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derived solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 403-404.

Further, at pg. 406, the Court said: "Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalized the free exercise of her constitutional liberties."

Undeniably, many of those who choose religiously-oriented schools do so out of conscience. By comparison, the pressure on them to violate their conscience is far greater than on the Seventh-Day Adventist because the benefit involved is so much greater—thousands of dollars per child versus some twenty-two weeks unemployment payments. Clearly, the principle enunciated in **Sherbert** is irreconcilable with the Court's present position in regard to non-public schools.

II. Extending Public Educational Benefits to Those Who Choose Religiously-Oriented Non-Public Schools Does Not Violate the Establishment Clause.

The reasoning behind **Lemon-Di Censo, Levitt, Nyquist** and **Sloan** is that the various aid programs violate the Establishment Clause in that they (1) have a primary effect which advances religion, (2) they create excessive entanglement between Church and State, and (3) they foster political divisiveness.

The advancement of religion argument is based on the notion that aiding non-public schools or those who choose them amounts to a subsidy to religion or the exercise thereof. To subsidize something implies the giving of a special benefit. Public education, with its universal availability, cannot be considered a special benefit, thus the extension of public educational benefits is in the nature of a right, not a special benefit. If the government did not finance public schools, then a special grant for religiously-oriented education would indeed constitute a subsidy to religion. Parents who pay taxes for public schools, yet choose religiously-oriented non-public schools, must be quite

weary of hearing programs which are designed to relieve their burden described as subsidies.

This approach also disposes of the argument that no one should be taxed to support the religious activities of others. If public educational benefits are viewed as a right available to all and supported by everyone's taxes, then what concern is it to others that some use these benefits to obtain a religiously-oriented education? But, they contend, the public schools are open to all, if they want something extra, let them pay for it. It is not a question of wanting something extra, but rather something different. Those who choose religiously-oriented education want the same amount and type of secular education taught in the public schools, but instead of the "neutral" or secularist philosophy inculcated in the public schools, they may want Catholic, Lutheran or Jewish doctrine. Does this mean that they should be forced to forfeit all public educational benefits? Apparently the Court sees no injustice resulting from such a conclusion.

The principle that no one should be taxed to support the religious activity of others is not an absolute principle. If our country had a totally socialized economy, then obviously public money would have to be allocated to finance all religious activities. Our country, like many others, has become progressively socialized, particularly in the area of education. Since most families can budget only a certain amount for education, if that amount is taken through taxation to support the public schools, they are forced to look to the government for allowances for non-public schools. While it has never been fair to deny educational benefits to those who choose non-public schools, it was possible until recently for most families to avail themselves of this choice through personal sacrifice. Now, with education costs spiralling, relatively few can afford non-public schools, a fact evidenced by the large number of schools closing. If some relief is not granted soon, the vast

majority of non-public schools will close, leaving only the wealthy with the choice guaranteed them by **Pierce v. Society of Sisters.**

Nor does it follow that since those without children pay school taxes but receive no benefit, those who choose non-public schools likewise have no grievance. The latter are part of the class that is capable of sharing in the benefit, while those without children are incapable of receiving direct personal benefit.

Excessive entanglement between Church and State is concededly undesirable for both institutions. Yet so long as the government is to be the distributor of public educational benefits, a certain degree of involvement between the two is unavoidable if we are to have a just distribution of those benefits. The accreditation of non-public schools and the certification of their teachers necessitates some Church-State involvement. If this degree of involvement is not proscribed, why is it then objectionable to have programs which permit non-public school parents and children to share in public educational benefits? Government surveillance of aid programs is unnecessary since the accreditation process ensures that the non-public schools are providing a satisfactory curriculum of secular instruction. It is not the government's nor any taxpayer's concern that some parents choose to use their share of the educational benefits in schools which inculcate religious principles in addition to secular instruction.

To state the "political divisiveness" argument is to ridicule it. If avoidance of strife is a legitimate constitutional end, then why enact any civil rights measures? Racial unrest is a far greater source of political strife than the non-public school issue. Would anyone seriously argue that minority grievances should be quietly ignored because any attempt to remedy them inevitably displeases certain groups? While it is conceivable that a legislative body might out of expediency take this ap-

proach to a constitutional issue, the acceptance of this proposition by the Supreme Court is alarming. Non-public school parents and their children have vital First Amendment rights at stake in this case, and to sacrifice those rights merely to avoid possible political strife is indefensible.

III. The Religion Clauses of the First Amendment Require Governmental Neutrality Toward Religion to Insure Absolute Freedom of Choice in Matters of Belief.

In **Engel v. Vitale**, 370 U.S. 421 (1962) (school-prayer), and **Abington School District v. Schempp**, 374 U.S. 203 (1963) (bible reading), the Court was faced with cases involving conflicts between the two Religion Clauses. In an attempt to reconcile the two, the Court evolved the principle of governmental neutrality toward religion. Government must neither aid religion, nor be hostile toward it. It is our contention that the denial of public education benefits to those who choose religiously-oriented non-public schools amounts to hostility toward religion.

On the non-public school issue, the Court has consistently analyzed the cases only in terms of the Establishment Clause. In **Sherbert v. Verner**, *supra*, Justice Stewart in a concurring opinion expressed his concern that an overly-rigid application of the negative values in the religion clauses could produce results inimical to the positive value of true freedom of choice of religious belief. He felt that a "mechanistic concept of the Establishment Clause, is historically unsound and constitutionally wrong" and would lead to "many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause. . . . I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of

hospitality and accommodation to individual belief or disbelief." 374 U.S. 414-415.

It is particularly important that the government remain neutral in regard to choice of schools. Justice Brennan in a concurring opinion in the **Schempp** case specifically mentioned the duty of the government to refrain from influencing the choice between public and non-public schools:

> "Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment, the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish or by jeopardizing the freedom of the public schools for private or sectarian pressures. The choice between these very different forms of education is one very much like the choice of whether or not to worship, which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election." 374 U.S. at 242.

Other than imposing outright criminal sanctions, the government could not more effectively inhibit free choice than is done now by forcing parents to choose between free public schools and non-public schools. The attractiveness is diminished only to the extent of thousands of dollars of tuition which most families do not have even if they were willing to undergo the expense.

CONCLUSION

The Title I program is permissible under the First Amendment and thus the decision of the Court of Appeals should be sustained.

Respectfully submitted

PATRICK M. DUGGAN
871 Gardenway Drive
Manchester, Missouri 63011

JAMES P. FINNEGAN, JR.
706 Chestnut
St. Louis, Missouri 63101
Attorneys for the Amici Curiae